

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL **75-6133**

IN THE
United States Court of Appeals *B* *P/S*

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL R. BROWN, UNITED STATES
TELEPHONE CO.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANTS-APPELLANTS.

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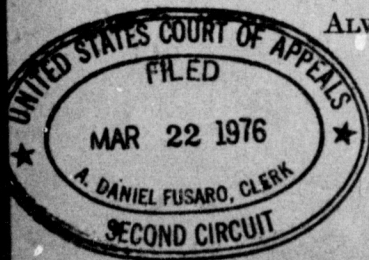


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BRIEF OF DEFENDANTS-APPELLANTS.

This is an appeal from the judgment of the United States District Court for the Southern District of New York (Werker, J.) dated October 16, 1975 (A. 181a), against defendants-appellants for \$1,522,454.50 in an action by the United States under 19 U.S.C. section 1592 (hereafter "section 1592") to recover the value of imported decorator telephones found to have been introduced into the commerce of the United States by means of fraudulent invoices. The memorandum decision of the court below (A. 167a) has not been officially reported.

Issues Presented for Review.

1. Whether the judgment below represents the "value" of the imported telephones within the meaning of section 1592 and, if not, whether the record contains evidence from which such value can be determined.

2. Whether recovery, included in the judgment below, on account of telephones which were entered prior to five years before the filing of the complaint is time-barred under the limitation of actions prescribed by 19 U.S.C. section 1621.

Statutes and Regulation Involved.

19 U.S.C. sections 1592 and 1621 and 19 C.F.R. section 162.43(a) and (b) are set forth in the Addendum to this brief, *infra*, pages 22-23.

Statement of the Case.

Section 1592 provides for the forfeiture of imported merchandise introduced into the commerce of the United States by means of false or fraudulent invoices or, in the alternative, for the recovery of the value of the merchandise from the persons who introduced it.

It was stipulated at trial that the defendant Brown, acting on behalf of the corporate defendant of which he was then vice-president (A. 79a), had caused 50 entries of decorator telephones¹ manufactured in Japan to be entered into domestic commerce in the period from October, 1964, to September, 1968 (A. 162a, item 1; 164a, item 32). The judgment was for an amount found by the court to be the value of these entries which, as it held, the defendants had procured by means of false invoices (A. 171a, 173a).

The complaint was filed on July 23, 1971, and the case tried on August 13, 1975 (A. 1a, 7a). On July 2, 1971, the defendants were convicted under an indictment returned March 2, 1971, of violating 18 U.S.C. section

¹European-style instruments, illustrated at A. 159a, 161a.

542 by introducing into commerce 36 of the 50 entries involved in the present action by means of false invoices (A. 167a).² This Court affirmed. *United States v. Brown*, 456 F. 2d 293 (1972), cert. den., 407 U. S. 910.³

The court below entered partial summary judgment against the defendants on the issue of fraud as to 32 of the 36 entries involved in the criminal proceeding, holding that the convictions were *res adjudicata* as to that issue. Because Brown's plea of the statute of limitations presented a factual issue with respect to the remaining four entries, the court reserved that issue for trial along with the issue of fraud as to the 18 entries not involved in the criminal proceeding and the issue of the value of all 50 entries (A. 167a-168a).

The one day bench trial was held August 13, 1975. The Government called two witnesses, Harry Haroian, a Customs supervisory import specialist, and John G. O'Brien who, at all relevant times, had been a Customs examiner. Brown was the sole witness for the defendants (A. 10a, 56a, 78a).

The memorandum decision below found that the 14 entries on which the issue of fraud was reserved for trial, like the 36 entries involved in the criminal case, had

²This was in a second trial, the jury having failed to reach a verdict in the first. Brown received a sentence of 72 days in prison to be served on weekends, later suspended, and a fine of \$36,000, later reduced to \$12,600. The corporate defendant was fined \$3600.

³Following denial of certiorari, and prior to the trial of the present case, a petition for writ of error *coram nobis* was dismissed by the District Court and its action affirmed. *Brown v. United States*, 493 F. 2d 1397 (1974), cert. den., 419 U. S. 837.

been imported by means of two sets of invoices for each entry, identical in all respects except for the unit prices and the aggregate prices of the invoiced merchandise. One set of invoices was submitted to Customs while the other was not but was presented to a bank for the purpose of securing a letter of credit. The prices stated in the invoices submitted to Customs were in the main considerably lower than those stated in the invoices used to obtain letters of credit (A. 168a-169a).

Brown testified that the prices appearing on the invoices submitted to Customs differed from those on the invoices presented to banks because the former represented the factory prices of the telephones while the latter included, in addition, general overhead expense such as engineering charges, tools and dies manufactured but not used, defective merchandise, legal expense and commissions to factors. The court rejected Brown's explanation and concluded that a fair preponderance of the evidence established that the defendants had violated section 1592 as to all 50 entries (A. 88a-89a, 169a, 171a).

This appeal does not contest that conclusion. It challenges the findings below (1) that the value of the 50 entries for the purpose of section 1592 was \$1,522,454.50, (2) that their value for that purpose is susceptible of determination from the evidence in the case, and (3) that recovery is not time-barred as to 15 entries made more than five years before the commencement of the action.

The evidence and findings as to value.

By stipulation, the invoices covering each of the 50 entries which (a) were submitted to Customs and (b) were used to obtain letters of credit were introduced in

evidence (G. Exs. 1-50, 1A-50A). Several examples of each are reproduced in the Appendix (A. 136a, 137a, 140a, 141a, 144a, 145a, 148a, 150a).⁴

Haroian was the Government witness on value. He testified that he had made an appraisal "under Section 592" of the "domestic value" of the telephones listed in the invoices. He defined the "domestic value" of this merchandise to be, "The price at which it was freely offered and sold in the market, in the usual quantities here in the United States" (A. 16a). As we later show (*infra*, pp. 11-12), Haroian's definition of "domestic value" is contrary to the definition of the term in the relevant Treasury Department regulation, 19 C.F.R. 162.43.

With the exceptions noted below, Haroian appraised the domestic value, as defined by him, of each model of telephone listed in the invoices at the wholesale price for that model appearing in one or another of five price lists of United States Telephone Company dated respectively March 1, 1966, August 1, 1966, April 21, 1967, 1972 and 1972 (A. 155a-160a; G. Exs. 51-55).⁵ He testified that the price lists were "The best information available at the time" of the domestic value of the telephones (A. 16a-17a).

⁴Also introduced under the stipulation were special Customs invoices for the entries. These are required on imports in excess of \$500 and contain a representation by the importer that there are no other invoices with the exceptions, if any, listed by him. No such exceptions are listed. (G. Exs. 1B-49B). See A. 138a, 142a, 146a, 151a for examples.

⁵The reference is to the section of the Tariff Act of 1930 which appears in Title 19 U.S.C. as Section 1592.

⁶The price lists were admitted over defendants' objection that they were not relevant to domestic value (A. 17a-18a).

Haroian acknowledged, however, that the Government had never ascertained whether the defendants had made any sales of the telephones or, if so, at less than the listed prices (A. 37a-40a). Furthermore, although Haroian defined domestic value as the price of merchandise offered and sold "in the usual quantities" (A. 16a), it does not appear that he ascertained the usual quantities in which the telephones were sold or the quantities to which the price lists were applicable.

Haroian identified a series of five charts (G. Exs. 70-74; A. 162a-166a) which summarize the relevant information contained in the invoices for each of the 50 entries and show Haroian's appraisal of the domestic value of the telephones included in each entry. As he testified, column 1 on the charts gives the exhibit number of the invoice in question; column 2, the date of the entry; column 3, the Customs number of the entry and the identity of the letter of credit issued with respect to it; column 4, the models and the number of units of each model included in the entry; column 5, captioned "First Invoice Price," the unit price of each model as it appears in the invoice submitted to Customs; column 6, captioned "Second Invoices Price," the unit price of each model as it appears in the invoice not submitted to Customs but used for the issuance of a letter of credit; column 7, Haroian's appraisal of the per unit domestic value of each model, and column 8, his appraised domestic value of the entire entry, based on the values in column 7 (A. 19a-27a).

Haroian testified that all of the prices shown in column 7 of G. Exhibits 70-72 were obtained from the United States Telephone Company price lists (G. Exs. 51-55) with the exception of the prices for the Electra Gold and Electra Ivory models included in G. Exhibits 31 and

32. Lacking any price list for these models covering the period of their entry, he valued them at what came to be referred to at the trial as their "second invoice prices"—i. e., the prices which appear in the invoices presented to the banks but not to customs. For the same reason, he used the second invoice prices as the domestic values of the U. S. 4 models appearing on the last two charts, G. Exhibits 73 and 74, A. 165a, 166a (A. 23a-25a).

Brown testified that the prices which appear on the price lists, G. Exhibits 51-55, are the prices the defendants received from gift stores for orders of one or two instruments, and that such orders represented no more than five or ten per cent of their sales (A. 114a). The balance of their business was with such customers as Sears Roebuck, Montgomery Ward, Western Electric, the Bell System and Macy's which made purchases in quantities and at prices considerably below list. He gave as an example a model listed at \$35.50 which he sold to Macy's for about \$28.50 and to large wholesalers like the Radio Shack for \$25.50. He went on to detail other instances of models which were sold at prices far below list and of some which were never sold or were sold and returned (A. 93a-100a).

Brown explained that the purpose of the defendants' price lists was twofold: To give them as sellers a bargaining position from which to negotiate with large buyers, and to prevent the small retailer from selling at a price so low as to erode the price which the large buyers could command (A. 95a, 121a-122a).

Brown further testified that, as a rule of thumb, he sought to sell telephones at prices which, on the average, would represent "a 1.2 markup" on the first invoice

prices—i. e., the prices appearing on the invoices submitted to Customs. He explained that what he called "a 1.2 markup" was the equivalent of 2.2 times the first invoice price. The listed prices on the other hand, represent 2.8 to 3 times the first invoice price (A. 113a, 119a-120a, 122a-123a, 130a).

The court below adopted Haroian's definition of domestic value as the standard for determining value under section 1592. It likewise accepted Haroian's application of that definition by valuing the telephones at the prices shown in defendants' price lists, or at their second invoice prices where there was no applicable listed price. It found Brown's testimony concerning quantity discounts from listed prices "reasonable," but disregarded it for "lack of corroboration." It accepted Brown's rule of thumb 1.2 markup, but applied it, not to the first invoice prices as Brown testified that he did, but to the higher second invoice prices. The use of this formula for domestic value, the court found, would yield a result only \$84,000 below Haroian's figure. It therefore granted judgment for the latter (A. 171a-173a).

The evidence and findings as to the statute of limitations.

19 U. S. C. section 1621 (hereafter "section 1621") requires actions under section 1592 to be commenced within 5 years "after the time when the alleged offense was discovered."

The complaint was filed on July 23, 1971 (A. 1).⁷ the first 15 entries on which recovery was granted were made between October 28, 1964, and April 23, 1966, all more than 5 years prior to commencement of the action. The

⁷The memorandum decision erroneously gives this date as July 21, 1971 (A. 171a).

aggregate value of these entries, as testified to by Haroian and found by the court, is \$486,706.10 (G. F. 70, 71, items 1-15; A. 162a-163a).

The Government witness on the limitations issue was the former Customs examiner, O'Brien. He testified that he requested a meeting with Brown in 1964 for the purpose of securing information concerning a royalty charge in Brown's favor that appeared on invoices for the import of telephones on which Brown did not appear as importer. At the meeting, Brown informed O'Brien that the charge was for patent rights held by him, and agreed to supply the documentation covering the matter. Brown did not do so. O'Brien's office made a few telephonic requests for the information, but O'Brien had no further discussions with Brown until 1969. In or about October, 1965, O'Brien sent a value inquiry to the Treasury representative in Japan requesting him to determine the prices the importer had paid for the telephones. At that time, O'Brien testified, he had no evidence of fraud, and did not have such evidence at any time prior to July 21, 1966. In October, 1966, he received the written report of the Treasury representative in Japan (A. 63a-64a).

Brown testified that he had been informed from Japan early in 1965 that Customs was concerned about the two sets of invoices, one of which had not been submitted to it (A. 86a).

After the close of the evidence, the court below suggested that the report of the Treasury representative in Japan was the best evidence of the date on which it was written. Counsel for the defendants^a agreed, but added that it was not the best evidence "as to when knowledge

^aNot their counsel on this appeal.

was had." The court responded that, "It depends on what the report says (A. 133a).

Without objection, the report was then received in evidence (A. 134a). It is dated October 24, 1966, states that the writer first interviewed the officers of the defendants' agent in Japan on July 26, 1966, and sets forth his findings with respect to the two sets of invoices (G. Ex. 76).

The court below found that that no evidence of fraud was received by Customs "during the period October 1965 and October 24, 1966, nor any received prior to July 21, 1966." Erroneously stating that the complaint was filed July 21, 1971, instead of July 23, 1971, as it was (A. 1a), the court concluded that the defense of the statute of limitations had not been sustained (A. 171a).

ARGUMENT.

I.

The judgment below is not for the "value" of the imported telephones within the meaning of section 1592, and the record is devoid of evidence from which such value can be determined.

The Government witness Haroian employed, and the court below adopted, an erroneous standard for appraising the value of imported merchandise for the purposes of section 1592. Moreover, they misapplied the standard which they did employ. The judgment below must therefore be reversed. Furthermore, the record is devoid of evidence from which this court can determine the value of the telephones under the applicable standard.

A. The erroneous standard of value.

Haroian appraised the telephones at what he called their "domestic value" which he defined as "the price at which [the merchandise] was freely offered and sold in the market, in the usual quantities here in the United States" (A. 16a). The court adopted this definition (A. 172a). Neither the witness nor the court indicated the source of the term or of the definition, and the latter is plainly erroneous.

Section 1592 does not use the term "domestic value." It provides for the recovery of the "value" of imported merchandise, at the option of the Government, in lieu of its forfeiture. It does not define the term "value" except to state that forfeiture "shall only apply to the whole of the merchandise or value thereof" to which the fraud relates.

The term "domestic value" does appear in 19 U. S. C. section 1606 which requires an appraisal of the "domestic value at the time and place of appraisement" of any merchandise seized under the customs laws. 19 C. F. R. section 162.43(a) defines "domestic value" as used in section 1606 to be "the price at which such [seized property] or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade."

19 C.F.R. section 162.43(b) provides that in the case of property not under seizure, "the basis of the claim for forfeiture value or for assessment of penalty is the domestic value as defined in paragraph (a) of this section, except that the value shall be fixed as of the date of the violation," which in the case of entered merchandise shall be the date of the entry.

Accordingly, the value of merchandise subject to forfeiture which is recoverable under section 1592 is its domestic value as defined in section 162.43(b) of the regulations. The Government acknowledged as much in its Trial Memorandum of Law, pages 24-25, included in the record on appeal. The memorandum quotes 19 C.F.R. 162.43 (a) and (b) and then states: "Thus in a forfeiture action under Title 19, United States Code, Section 1592, the value of the merchandise to be forfeited is its 'domestic value' as defined above."

Haroian's definition of "domestic value" differs from that of section 162.43 of the regulations in three crucial respects. First, the value to be ascertained is not the market price of the merchandise "in the usual quantities," but "in the same quantity or quantities as seized," or subject to seizure." Second, the value to be ascertained is not the market price "here in the United States," but "at the place of appraisement"—i. e., at the port of entry. Third, Haroian's definition makes no reference to the date as of which domestic value is to be determined while the regulation provides that "the value shall be fixed" as of "the date of entry."

In the present case, the quantity of telephones subject to seizure was the quantity included in each entry. This amounted to 2200 units in the case of one entry, approximated 2000 in the case of four entries, and exceeded 1000 in most of the others (G. Exs. 70-74, A. 162a-166a). Plainly, these were not the "usual quantities" of Haroian's definition in which the telephones were sold in the United States, whatever those quantities might have been determined to be. And it is self-evident that the market

⁹This portion of the definition elucidates the language of Section 1592 in speaking of the value of "the whole of the merchandise" to which the fraud relates.

prices in these quantities must have been substantially below the price obtainable from sales "in the usual quantities."

It is likewise self-evident that, irrespective of quantity, the market price at the port of entry on the date of entry must have been substantially below the prices obtainable "in the United States" at unspecified times after entry. For the former price would exclude, and the latter include, allowances for transportation, insurance and other carrying charges, sales expense and the like.

It is therefore beyond dispute that the erroneous standard of value employed by the Government "expert" (who appears to have been ignorant of the regulation governing his duty as an appraiser) would, even if adhered to, result in a gross overstatement of the domestic value of the entries under the applicable standard.

The Government, of course, is bound by its own regulations where their violation results in substantial prejudice. *Service v. Dulles*, 354 U. S. 363, 373, 388-89 (1957); *Accardi v. Shaughnessy*, 347 U. S. 260 (1954).¹⁰ Regard for this principle is of special importance when applied to the enforcement of a punitive statute like section 1592. The extremely punitive character of the judgment below appears from the fact that it is for more than 39 times the Government's \$38,471.22 loss of revenue¹¹ from the alleged fraud.

The Government's disregard of the applicable regulation and its resort to the shortcut procedure, adopted by

¹⁰19 U.S.C. Section 1624 authorizes the Secretary of the Treasury to make such rules and regulations as may be necessary to carry out the enforcement provisions of the Tariff Act of 1930.

¹¹17½% (the applicable rate) of the difference between the dutiable value of the entries when computed at second invoice and at first invoice prices.

the court below, for evaluating the telephones requires reversal of the judgment.

B. The misapplication of the standard of value employed by the Government.

Even if Haroian's definition of domestic value had represented the appropriate standard for determining the value of the telephones, reversal would still be required because he and the court below misapplied the standard they purported to employ.

Although Haroian defined domestic value as the market price of the merchandise "in the usual quantities," it does not appear that the Government made the slightest effort to determine "the usual quantities" in which decorator telephones are sold. Similarly, it relied on the price lists as determinative of domestic value without determining the quantities to which the listed prices applied. Lacking both pieces of information, it is no more possible to evaluate the telephones from the price lists than to solve a single equation containing two unknowns.

Haroian testified that the price lists were the best indications of prices "lacking any other information" (A. 37a). But there is nothing in the record to indicate that other and more relevant information was unavailable to the Government. Haroian conceded that if there had been "significant sales in substantial quantities" below the listed prices, he would consider them in making his appraisal (A. 49a). The records of the defendants and their customers obviously contained such information. It does not appear that any effort whatsoever was made to obtain it from defendants' customers. Haroian testified that "to the best of my knowledge" another Customs agent tried and failed to obtain this information from

the defendants (A. 38a). But the defendants, of course, were under no duty to volunteer evidence the Government required to prove its case, and the record is silent as to any attempt to obtain it from them by subpoena or discovery.

Brown testified that 85% to 95% of defendants' sales were at prices substantially below list, and that the price lists were for sales, not in the usual quantities, but of one or two instruments to small retailers (A. 93a-100a, 114a). The court below discredited this testimony for "lack of corroboration" (A. 172a). But corroboration was unnecessary for two reasons. First, the testimony was uncontradicted. Second, as the court acknowledged, it "seemed reasonable" (*Ibid.*). Indeed, it is not only reasonable but axiomatic that the larger the quantity sold, the greater the discount from list.

It was not Brown's but Haroian's testimony that should have been discredited. For the latter's appraisal was based on the patently false assumption that, contrary to his own formula for appraising domestic value, the price of merchandise to a customer is unaffected by the quantity sold.

The court below sought to justify acceptance of Haroian's \$1,522,454.50 appraisal by calculating that Brown's 1.2 rule of thumb markup¹² would yield a value of \$1,438,379.22. The court arrived at this result only by grossly distorting Brown's testimony.

Brown testified that the 1.2 markup was "from the first invoice price"—i.e., the lower of the two invoice prices listed on the charts, G. Exs. 70-74 (A. 113a, 130a).

¹²I.e., 2.2. times the base price. See *supra*, p. 8.

The memorandum decision states that, "The court accepts and finds that the usual markup on the units was 1.2% to 1.5% (A. 172a). It does not, however, identify the base price to which, as Brown testified, the markup is to be applied. It then proceeds to apply the markup, not to the first invoice, price, as Brown testified that his rule of thumb called for, but to the *second* and higher invoice price (A. 173a). It is only this use of one half of Brown's rule and disregard of the other that could yield a value within the same ball park as Haroian's. When the 1.2 markup is applied to the first invoice prices in accordance with Brown's testimony, it results in an aggregate value of \$968,180.86¹³ for the 50 entries.

C. Conclusion as to value.

We have shown that the judgment below was not for the "value" of the telephones as that term is used in section 1592. This is so both because the amount of the judgment was arrived at by the use of an erroneous definition of such value and because the Government and the court misapplied the definition that was used. As has also been shown, the record is devoid of evidence from which this Court could determine the value of the telephones, either under the standard prescribed by 19 C. F. R. 162.43¹⁴ or under the erroneous standard adopted below. The judgment must therefore be reversed.

Finally, it appears from the record that the Government's application of section 1592 to the defendants was

¹³2.2 times \$440,082.21, the total of the first invoice prices.

¹⁴Brown's rule of thumb, even if applied as he used it, would not measure domestic value as defined in the regulation. For Brown's 1.2 markup has no application to sales in the quantities subject to seizure. And, in any event, it does not measure value at the port of entry on the date of entry but includes allowances for costs incurred subsequent to entry.

not only punitive but vindictive. Had its concern been with the speedy and effective enforcement of the Tariff Act, it could have accomplished this purpose by seizing the defendants' first shipment of telephones that followed discovery of the alleged fraudulent scheme.¹⁵ That action would have put an end to their use of the scheme. Instead, the Government permitted the defendants to make 35 entries by means of the same scheme over a period of more than two years following the discovery. It thus piled up penalties under section 1592 by leading Brown, who had been advised by his agent of the result of the Customs investigation (A. 86a), to believe that his use of the two sets of invoices was permissible.

Unexplained as it is on this record, the Government's behavior warrants the conclusion that its interest was not in securing compliance with the revenue laws but in victimizing the defendants. It is therefore submitted that, even if the Government had proved the domestic value of the entries, its conduct bars recovery for entries made subsequent to discovery of the alleged fraud.

II.

Recovery of the value of telephones entered prior to July 23, 1966, is time-barred by 19 U.S.C. section 1621.

Section 1621, in terms, bars recovery under section 1592 unless the action is commenced within five years "after the time when the alleged offense was discovered." The section likewise bars recovery if the action is not commenced within five years after the time when the al-

¹⁵Brown testified that Customs had seized a shipment in Los Angeles in 1967 or 1968 but then released it (A. 84a-85a).

leged offense could have been discovered by the exercise of due diligence. This is so because there "is read into every federal statute of limitation" the doctrine "that where a plaintiff has been injured by fraud and 'remains in ignorance of it *without any fault or want of diligence on his part*, the bar of the statute does not begin to run until the fraud is discovered.'" *Holmberg v. Armbrecht*, 327 U. S. 392, 397 (1946), quoting *Bailey v. Glover*, 21 Wall. 342, 348 (emphasis supplied).

Where a complaint in an action for fraud is filed after expiration of the number of years specified in the applicable statute of limitations, the burden is on the plaintiff to prove that discovery of the fraud first occurred within those years and, if so, that plaintiff was not at fault in failing to discover it earlier. *City of Detroit v. Grinnell*, 495 F. 2d 448, 460 (C. A. 2, 1974); *Baker v. F. & F. Investment Co.*, 420 F. 2d 1191, 1199 (C. A. 7, 1970), cert. den., 400 U. S. 821; *Movietone Ltd. v. Eastman Kodak Co.*, 288 F. 2d 80, 88, (C. A. 2, 1961), cert. den., 368 U. S. 821; *Akron Pressform Mold Co. v. McNeil Corp.*, 496 F. 2d 230 (C. A. 6, 1974), cert. den., 419 U. S. 997.

The Government failed to satisfy the first of these burdens with respect to the 15 entries, which were made more than five years prior to the filing of the complaint on July 23, 1971 and for which the court below granted judgment in the sum of \$486,706.60. (G. Exs. 70, 71, items 1-15; A. 162a-163a.)

The only testimony adduced by the Government as to the date of discovery of the fraud was the following by O'Brien (A. 64a):

"Q. Now, Mr. O'Brien, prior to July 21, 1966, did you have any evidence of the fraud which has

been alleged in this litigation? A. No, I did not.

"Q. Prior to July 21, 1966, did you have any evidence of Government's Exhibits 1-A through 50-A?

A. No, I didn't."

This testimony failed to satisfy the Government's burden for two obvious reasons. First, the issue is not when O'Brien personally discovered the fraud, but when the Government discovered it through any of its representatives or agents. Second, O'Brien's testimony that he did not discover the fraud "prior to July 21, 1966" leaves open the inference that he discovered it on that or the next day, both of which were more than five years prior to July 23, 1971, the date of filing the complaint.

In the course of colloquy following the close of the evidence in the court below, counsel for the Government stated that, with respect to the issue of limitations, "We rest on the fact that there is testimony that there is no knowledge on the part of the government as to any evidence of fraud prior to July 26, 1966" (A. 132a). As has been shown, there was no such testimony, and the "fact" on which the Government rested its case is nonexistent.

Since the Government failed to sustain its burden of proving that it discovered the fraud within the five year limitation period, it is unnecessary to consider whether it sustained the burden of proving due diligence in making the discovery.

The court below disposed of the limitations issue as follows (A. 171a):

"There was no evidence of fraud received by Customs during the period October 1965 and October 24, 1966 nor any received prior to July 21,

1966.¹⁶ The complaint here was filed on July 21, 1971 [*sic*] * * *. The defendants have failed to sustain the defense of the statute of limitations."

October, 1965, was the date on which, according to O'Brien, he sent a value inquiry on the telephones to the Treasury representative in Japan (A. 63a). October 24, 1966, was the date of the latter's written report (G. Ex. 76). Obviously, the date of the report does nothing to establish the date on which the Government first learned of the fraud. The court made no finding as to the date when the Treasury man in Japan first learned of it. The court evidently admitted his hearsay report, as it indicated that it might (see *supra*, pp. 9-10), only to establish the date on which it was written and not for its contents.¹⁷

If there had been any basis for the court's finding that no evidence of fraud was received by Customs prior to October 24, 1966, it would have been unnecessary to add, "nor any received prior to July 21, 1966." The latter

¹⁶This is not true. As shown above, there was no evidence whatsoever as to when *Customs* first received evidence of the fraud but only when O'Brien personally first learned of it.

¹⁷In any case, the July 26, 1966, date given in the report as the time of the Treasury representative's discovery of the fraud is of no significance in view of O'Brien's disclosure of knowledge "prior to July 21, 1966." Moreover, the Government introduced no evidence to satisfy its burden of proving due diligence in discovering the alleged fraud. It offered nothing to excuse or explain (1) O'Brien's delay of at least a year after his 1964 interview with Brown (A. 59a) before making the value inquiry, or (2) the Treasury representative's ten month delay from October, 1965, when he received the inquiry, until July 26, 1966, before initiating his investigation. While the opinion below makes passing reference to the volume of traffic and the size of the Customs staff in the Port of New York (A. 171a), it contains no finding on the issue of diligence.

date, more than five years before the filing of the complaint, is the one prior to which, as O'Brien testified, he did not learn of the fraud. The court evidently thought this date helpful to the Government, but only because of its erroneous belief that the complaint was filed on July 21, 1971.

The confused effort of the court below to support its finding in favor of the Government serves only to confirm that the finding is unsupportable and that recovery on the entries made prior to July 23, 1966, is barred by section 1621.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted,

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ADDENDUM.**Statutes and Regulation Involved.**

1. 19 U. S. C. section 1592 provides in pertinent part as follows:

If any consignor, seller, owner, importer, consignee, agent, or other person or persons enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or makes any false statement in any declaration under the provisions of section 1485 of this title (relating to declaration on entry) without reasonable cause to believe the truth of such statement, or aids or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement; or is guilty of any willful act or omission by means whereof the United States is or may be deprived of the lawful duties or any portion thereof accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates.

2. 19 U. S. C. section 1621 provides as follows:

No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided*, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation.

3. 19 C. F. R. 162.43 provides in pertinent part as follows:

(a) *Property under seizure and subject to forfeiture.* Seized property shall be appraised as required by section 606, Tariff Act of 1930, as amended (19 U. S. C. 1606). The term "domestic value" as used therein shall mean the price at which such or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade. If there is no market for the seized property at the place of appraisement, such value in the principal market nearest to the place of appraisement shall be reported.

(b) *Property not under seizure.* With respect to property not under seizure, the basis for the claim for forfeiture value or for assessment of penalty is the domestic value as defined in paragraph (a) of this section, except that the value shall be fixed as of the date of the violation. In the case of entered merchandise, the date of the violation shall be the date of the entry, or the date of the filing of the document, or the commission of the act forming the basis of the claim, whichever is later.